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No. 00-216

In the Supreme Court of the United States

WILLIAM G. MOORE, JR., PETITIONER

v.

JOSEPH B. VALDER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of petitioner's retaliatory prosecution claim against respondent prosecutor.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)	2-3
Buckley v. *Fitzsimmons*:	
509 U.S. 259 (1993)	6, 7, 8, 9, 10
20 F.3d 789 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995)	12
Burns v. *Reed*, 500 U.S. 478 (1991)	7
Crawford-El v. *Britton*, 523 U.S. 574 (1998)	11
Haynesworth v. *Miller*, 820 F.2d 1245 (D.C. Cir. 1987)	6, 7
Imbler v. *Pachtman*, 424 U.S. 409 (1976)	3, 7, 8, 10
Jones v. *United States*, 526 U.S. 227 (1999)	9
Kalina v. *Fletcher*, 522 U.S. 118 (1997)	7
United States v. *Stanley*, 483 U.S. 669 (1987)	10
Wilson v. *Thompson*, 593 F.2d 1375 (5th Cir. 1979)	6-7
Zahrey v. *Coffey*, 221 F.3d 342 (2d Cir. 2000)	12

Constitution, statutes and rule:

U.S. Const.:	
Amend. I	6, 12
Amend. V (Due Process Clause)	12
Amend. XIV (Due Process Clause)	12
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*	2
42 U.S.C. 1983 (1994 & Supp. IV 1998)	8
Fed. R. Crim. P. 29	2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 213 F.3d 705. The opinions of the district court dismissing petitioner's retaliatory prosecution claim (Pet. App. 33a-77a) and denying reconsideration of that decision (Pet. App. 15a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2000. The petition for a writ of certiorari was filed on August 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, inspectors from the United States Postal Inspection Service uncovered a criminal conspiracy involving corruption at the highest level of the United States Postal Service. The inspectors learned that a consultant retained by petitioner William G. Moore, Jr., and his company, Recognition Equipment Incorporated (REI), was paying kickbacks to United States Postal Governor Peter Voss. Pet. App. 98a-99a. Petitioner and REI had retained the consultant, John Gnau, and his firm, GAI, at the recommendation of Governor Voss (*id.* at 99a) in an effort to sell the Postal Service REI's multi-line scanners (Pet. 5). Voss and Gnau pleaded guilty to federal crimes. Pet. App. 98a. William Spartin, GAI's president, entered into a non-prosecution agreement with the government. *Ibid.* A grand jury eventually indicted REI, Moore, and REI vice president Robert Reedy for conspiracy to defraud the United States and other crimes. *Id.* at 96a-97a. Respondent Assistant United States Attorney Joseph B. Valder prosecuted the case. At the conclusion of the government's case-in-chief, the district court granted the defendants' motion under Federal Rule of Criminal Procedure 29 for a judgment of acquittal. *Id.* at 94a-125a.

2. After his acquittal, petitioner sued respondent and the postal inspectors in the United States District Court for the Northern District of Texas. See Pet. App. 79a-80a.[1] Petitioner asserted a variety of claims, including claims for malicious and retaliatory prosecution under *Bivens* v. *Six Unknown Federal*

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[1] Petitioner also sued the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* That suit is not at issue in this Court.

Narcotics Agents, 403 U.S. 388 (1971). Pet. App. 79a-80a & n.3. The petition for a writ of certiorari, however, concerns only the claim that respondent prosecuted petitioner in retaliation for his public criticism of the Postal Service's decision to use single-line rather than multi-line scanners. See Pet. i. Petitioner alleged that respondent committed various instances of misconduct during the prosecution and preceding investigation, including intimidating and coercing witnesses, presenting incomplete and misleading witness statements to the grand jury, failing to provide exculpatory information to the defense, and disclosing grand jury testimony to third parties. See Pet. App. 80a.

The district court dismissed the *Bivens* claims against respondent on the ground that he was absolutely immune from suit under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). Pet. App. 80a. The court also dismissed the claims against the postal inspectors, except those for malicious and retaliatory prosecution. *Ibid.*[2] The court then transferred the case to the United States District Court for the District of Columbia, which dismissed the remaining claims. See *id.* at 80a-81a.

Petitioner appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 78a-93a (65 F.3d 189). As relevant here, the court of appeals held that respondent was absolutely immune from liability arising from his "unquestionably advocatory decision to prosecute [petitioner]" and from much of the other misconduct alleged by petitioner. Pet. App. 86a. The court held, however, that respondent

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[2] The district court also dismissed the other claims against respondent and the inspectors. See Pet. App. 80a n.3. None of those claims is at issue in this Court.

was entitled only to qualified immunity from liability arising from his alleged coercion and intimidation of witnesses and alleged improper disclosure of grand jury information. See *id.* at 86a-88a. The court remanded for further proceedings consistent with its opinion. *Id.* at 93a.[3]

3. After remand, respondent moved for summary judgment on the ground that petitioner's surviving allegations of witness coercion and intimidation and improper disclosure of grand jury information failed as a matter of law to establish retaliatory prosecution. See Pet. App. 50a-51a. On February 5, 1998, the district court granted the motion. *Id.* at 33a-77a. The court agreed that petitioner could not show that respondent was liable for retaliatory prosecution without relying on conduct for which the court of appeals had held that respondent was absolutely immune from liability. *Id.* at 50a-56a.[4]

Petitioner moved for reconsideration. See Pet. App. 17a. On May 6, 1999, the district court denied that motion. *Id.* at 15a-27a. The court reaffirmed its conclusion that the alleged conduct for which respondent was not absolutely immune from liability was insufficient to establish retaliatory prosecution. *Id.* at 19a. The court explained that, in order to prevail on a claim of retaliatory prosecution, petitioner would be required

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[3] The court of appeals also affirmed the district court's dismissal of petitioner's malicious prosecution claim against the postal inspectors but reinstated the retaliatory prosecution claim against the inspectors. See Pet. App. 88a-90a. The claims against the inspectors are not at issue in this Court.

[4] Petitioner conceded in his opposition to respondent's summary judgment motion that the only remaining claim against respondent was the claim for retaliatory prosecution. Pet. App. 51a n.13.

to prove that respondent instituted or caused the prosecution, and the court of appeals had made clear that respondent was absolutely immune from liability based on that conduct. *Id.* at 19a-20a. The court also rested its denial of reconsideration on the alternative ground that petitioner had not presented a jury question on the retaliatory prosecution claim because he had "presented no evidence to show that [respondent] had an unconstitutional retaliatory motive" and had "conceded that [respondent] had motives that were independent of the postal inspector[s'] allegedly retaliatory motives." *Id.* at 22a.

4. Petitioner once again appealed, and the court of appeals affirmed the judgment in respondent's favor. Pet. App. 1a-14a. The court first rejected petitioner's argument that the district court had contravened the mandate of the first appeal. *Id.* at 6a-7a. The court observed that, although its prior opinion held that some of respondent's alleged conduct was not absolutely immune and remanded the retaliatory prosecution claim, "that opinion said nothing about the elements of such a claim, or whether [petitioner] could succeed on his complaint. Rather than dealing with those subjects, the opinion focused on the type of prosecutorial conduct for which there would be absolute immunity." *Id.* at 6a.

As to the merits of the district court's judgment, the court of appeals affirmed the dismissal of petitioner's retaliatory prosecution claim. The court of appeals agreed with the district court that petitioner's retaliatory prosecution claim is "predicated upon [respondent's] decision to prosecute" him and that respondent is absolutely immune from liability arising from that decision. Pet. App. 6a-8a. The court of appeals distinguished petitioner's retaliatory prosecution claim against respondent from "potential causes of action

against prosecutors that do not rely on the decision to prosecute," and suggested that such actions could be brought without running afoul of absolute immunity. *Id.* at 7a-8a.

ARGUMENT

1. Petitioner contends (Pet. 12-14) that this Court's review is warranted because the decision of the court of appeals conflicts with this Court's decision in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993). Contrary to petitioner's contention, however, the decision of the court of appeals is fully consistent with *Buckley*.

Petitioner's argument reflects a misunderstanding of both the decision of the court of appeals in this case and the decision of this Court in *Buckley*. Contrary to the impression created by the petition, the court of appeals did not extend to respondent absolute immunity for the investigatory misconduct petitioner alleges. Instead, the court of appeals held that petitioner's claim of retaliatory prosecution cannot survive the court's prior holding that respondent is absolutely immune for initiating petitioner's prosecution. See Pet. App. 6a-8a. That holding rested on the court's conclusion that petitioner's allegations of investigatory misconduct were insufficient to state a claim for retaliatory prosecution, because such a claim is "predicated upon [the] decision to prosecute." *Id.* at 7a.

The court's understanding of the elements of a retaliatory prosecution claim was correct. Although this Court has not squarely addressed whether a *Bivens* cause of action may be maintained for prosecution in retaliation for the exercise of First Amendment rights, the lower federal courts, including the court of appeals in this case, have recognized such a claim. See, *e.g.*, *Haynesworth* v. *Miller*, 820 F.2d 1245, 1257 n.93 (D.C.

Cir. 1987). See also *Wilson* v. *Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979). To establish such a claim, a plaintiff must show "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." *Haynesworth*, 820 F.2d at 1257 n.93 (quoting *Wilson*, 593 F.2d at 1387). See also Pet. App. 6a. If the plaintiff makes this showing, the defendant official nevertheless escapes liability by showing that the government "would have reached the *same decision as to whether to prosecute even had the impermissible purpose not been considered.*" 820 F.2d at 1257 n.93 (quoting *Wilson*, 593 F.2d at 1387) (emphasis added).

In light of the elements of retaliatory prosecution (which petitioner has not challenged), the court of appeals' decision that respondent's absolute prosecutorial immunity shields him from liability on such a claim is fully consistent with this Court's decisions, including *Buckley*. The Court has consistently held that initiating a prosecution is at the core of the conduct protected by absolute prosecutorial immunity. See *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976). That immunity is grounded in part in the prosecutor's "common-law immunity from malicious prosecution," which this Court has since described as "form[ing] the basis for the [Court's] decision in *Imbler*." *Buckley*, 509 U.S. at 271. See also *Kalina* v. *Fletcher*, 522 U.S. 118, 123-124 (1997); *Burns* v. *Reed*, 500 U.S. 478, 485 (1991).

Both petitioner's effort to show that respondent initiated his criminal prosecution for an impermissible purpose as well as the showing that respondent would be called upon to make in order to rebut that claim directly place at issue the absolutely immune decision

to prosecute. Adjudication of such a claim against a prosecutor "would devolve into 'a virtual retrial of the criminal offense [in] a new forum,' * * * and would undermine the vigorous enforcement of the law by providing a prosecutor an incentive 'to go forward with a close case where an acquittal likely would trigger a suit against him for damages.'" *Buckley*, 509 U.S. at 270 n.4 (quoting *Imbler*, 424 U.S. at 425, 426 & n.24 (citations omitted)).

Petitioner incorrectly asserts (Pet. 13) that *Buckley* "permits prosecutors to be sued for malicious prosecution claims if those claims are based upon investigatory conduct." All that the Court held in *Buckley* is that a prosecutor is not absolutely immune from liability for investigatory misconduct; the Court did *not* hold that investigatory misconduct alone can support a cause of action for malicious prosecution. In equating the absence of immunity for investigatory misconduct with the existence of a cause of action for retaliatory prosecution, petitioner overlooks that "the *Imbler* approach focuses on the conduct for which immunity is claimed, *not on the harm that the conduct may have caused or the question whether it was lawful.*" *Buckley*, 509 U.S. at 271 (emphasis added).

Thus, the Court in *Buckley* did not pass on the viability of a cause of action for malicious prosecution or any other cause of action. Indeed, the Court was careful to make clear that the "case [did] not present" "the question whether a complaint has adequately alleged a cause of action for damages." 509 U.S. at 272; see *id.* at 261 (assuming that the allegations of investigatory misconduct alleged constitutional violations for which 42 U.S.C. 1983 (1994 & Supp. IV 1998) provides a remedy). To the extent that *Buckley* speaks to the question presented here, the Court's opinion in that case fore-

shadowed the ruling of the court of appeals in this case when it observed that "[t]he location of the injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages." *Buckley*, 509 U.S. at 271-272. Consistent with that observation, Justice Scalia (who also joined the majority opinion) explained in his concurring opinion that investigatory misconduct does not become actionable merely because it is committed by a prosecutor before the initiation of a criminal case. See *id.* at 281 (Scalia, J., concurring) ("I am aware of * * * no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution.").[5]

2. For similar reasons, petitioner errs in contending (Pet. 15-23) that the decision of the court of appeals disregards the principles of official immunity formulated by this Court. Contrary to petitioner's assertion (Pet. 15-17), the court of appeals did not grant respondent

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[5] Petitioner errs in relying (Pet. 13-14) on Justice Kennedy's opinion concurring in part and dissenting in part for his contrary characterization of the Court's holding in *Buckley*. The opinion of the Court, not the dissent, is the reliable guide to the Court's holding in a case. See *Jones* v. *United States*, 526 U.S. 227, 249 n.10 (1999). In any event, Justice Kennedy's characterization of the consequences of the Court's opinion is significantly more tentative than petitioner's partial quotation suggests. See 509 U.S. at 287 ("*If* the Court means to withhold absolute immunity whenever it is alleged that the injurious actions of a prosecutor occurred before he had probable cause to believe a specified individual committed a crime, *then* no longer is a claim for malicious prosecution subject to ready dismissal on absolute immunity grounds, at least where the claimant is clever enough to include some actions taken by the prosecution prior to the initiation of the prosecution.") (emphasis added).

immunity based on his status rather than the function he performed. As we have explained, the court of appeals did not accord respondent absolute immunity for investigatory misconduct. Rather, the court held that petitioner's allegations of non-immune investigatory misconduct do not make out a claim of retaliatory prosecution. See Pet. App. 6a-8a. "[T]he availability of a damages action under the Constitution for particular *injuries* * * * is a question logically distinct from immunity to such an action on the part of particular *defendants*." *United States* v. *Stanley*, 483 U.S. 669, 684 (1987). The court of appeals acknowledged and reaffirmed its holding in its initial opinion in this case that respondent is entitled to absolute immunity only for his prosecutorial conduct. See Pet. App. 4a, 6a-7a.

Because the court of appeals accorded respondent absolute immunity only for his conduct in exercising prosecutorial functions, petitioner also errs in asserting (Pet. 17-23) that the decision of the court of appeals improperly enlarges the scope of absolute immunity for prosecutors. Contrary to petitioner's assertion (Pet. 18-19) that the immunity afforded respondent lacks any common-law pedigree, "the common law rule of immunity for prosecutors" from suits for malicious prosecution was "well-settled." *Buckley*, 509 U.S. at 269; see *id.* at 271; *Imbler*, 424 U.S. at 421-424. And, contrary to petitioner's contention (Pet. 20-23) that the immunity afforded respondent is unnecessary and unjustified, this Court has repeatedly explained the policy considerations that underlie a prosecutor's immunity from liability arising from the decision to prosecute. See *Buckley*, 509 U.S. at 270 n.4; *Imbler*, 424 U.S. at 424-428.

3. The other reasons that petitioner offers in his attempt to justify review by this Court also lack merit. Contrary to petitioner's contention (Pet. 23-25), the decision of the court of appeals does not conflict with *Crawford-El* v. *Britton*, 523 U.S. 574 (1998). In that case, this Court rejected a requirement that plaintiffs whose *Bivens* claims are predicated on allegations of unconstitutional motive present clear and convincing evidence of the improper motive in order to survive summary judgment. See *id.* at 577-578, 594-597. The decision of the court of appeals in this case does not rely on any such requirement. Nor, as we have explained, did the court "create[] a new form of prosecutorial immunity that has no common-law antecedent" (Pet. 24). The court of appeals held only that petitioner's allegations of non-immune investigatory misconduct are insufficient to state a claim of retaliatory prosecution. See Pet. App. 6a-8a.[6]

Petitioner's contention (Pet. 26) that the decision of the court of appeals "casts into doubt the commitment of the court * * * to the principle of the rule of law" is similarly unfounded. As we have explained, the de-

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[6] Petitioner is also mistaken in his claim (Pet. 24-25) that the decision of the court of appeals conflicts with the Court's statement in *Crawford-El* that a plaintiff who survives a motion to dismiss based on immunity "*ordinarily* will be entitled to some discovery." 523 U.S. at 598 (emphasis added). That statement is in no way inconsistent with the court of appeals' determination that discovery was unnecessary *in this particular case* because "additional facts [were] not necessary to resolve the summary judgment motion." Pet. App. 8a n.3. Indeed, petitioner has not explained how discovery could have altered the conclusion of the district court and court of appeals that petitioner's allegations of non-immune investigatory misconduct do not state a claim of retaliatory prosecution.

cision of the court of appeals is consistent with both the holdings of and the principles underlying this Court's decisions regarding prosecutorial immunity. See pp. 7-10, *supra*. And, as petitioner implicitly acknowledges (see Pet. 26), the decision of the court of appeals does not conflict with the decision of any other court of appeals.[7]

Finally, petitioner's closing assertion that "this case presents an ideal vehicle" (Pet. 28) to reaffirm the availability of *Bivens* actions against prosecutors overlooks that the district court, in denying reconsideration of its dismissal of the retaliatory prosecution claim, relied on the alternative ground that petitioner had "presented no evidence to show that [respondent] had an unconstitutional retaliatory motive" and had "conceded that [respondent] had motives that were independent of the

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[7] Two courts of appeals have divided on the question whether a prosecutor's fabrication of evidence can give rise to a violation of the due process clauses of the Fifth and Fourteenth Amendments. Compare *Buckley* v. *Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995), with *Zahrey* v. *Coffey*, 221 F.3d 342 (2d Cir. 2000), petition for rehearing en banc pending. In its first opinion in this case, the court of appeals read petitioner's complaint not to allege fabrication of evidence. Pet App. 81a. Petitioner did not seek review of that determination and has not amended his complaint. Petitioner also did not seek review of the dismissal of his due process claim. Therefore, only the First Amendment retaliatory prosecution claim remains. See note 4, *supra*. In the court of appeals, petitioner distinguished that claim as "very different" from the claims at issue in *Buckley*. See Appellant's C.A. Br. 39. Moreover, the court of appeals here noted that investigatory conduct by prosecutors may form the basis for claims that, unlike a claim for retaliatory prosecution, are not predicated on the decision to prosecute and are actionable. See Pet. App. 7a-8a. Hence, this case is not an appropriate vehicle to resolve any tension between the holdings of *Buckley* and *Zahrey*.

postal inspector[s'] allegedly retaliatory motives." Pet. App. 22a. That alternative ground supporting the judgments of the district court and court of appeals in this case provides yet another reason why the case is unsuited for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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